



January 27, 2012

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: RIN 1506–AB16—Imposition of Special Measure Against
Islamic Republic of Iran as a Jurisdiction of Primary Money
Laundering Concern

Dear Sirs:

The Clearing House Association L.L.C. (“The Clearing House”)¹ is pleased to comment on the proposal by the Financial Crimes Enforcement Network (“FinCEN”) to implement a special measure under section 311 of the USA PATRIOT Act against Iran, which FinCEN has already designated a jurisdiction of primary money laundering concern under section 311.²

The proposed rule would prohibit covered financial institutions from opening, maintaining, or managing in the United States any correspondent account for or on behalf of a banking institution in Iran. The rule would also require covered institutions to apply special due diligence to their correspondent accounts to guard against “improper indirect use” by Iranian institutions. This special due diligence must include at least two elements: first, a covered financial institution must notify all correspondent account holders that it knows or has reason to know provide services to Iranian banks that they cannot provide the Iranian banks with “access” to the correspondent

¹ Established in 1853, The Clearing House is the nation’s oldest banking association and payments company. It is owned by the world’s largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States. See The Clearing House’s web page at www.theclearinghouse.org for additional information.

² 76 Fed. Reg. 72,878 (Nov. 28, 2011).

accounts. Second, it must take reasonable steps to identify any indirect use by Iranian banks, “to the extent such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business.”³ FinCEN notes that in taking such reasonable steps, covered institutions would be expected to apply screening mechanisms, such as those used to identify funds-transfer payment orders involving entities blocked under the regulations of the Office of Foreign Assets Control (“OFAC”).⁴ FinCEN also notes that covered institutions should take a risk-based approach to determine what, if any, further due diligence measures should be taken to guard against improper indirect use.

If a covered institution obtains knowledge that one of its correspondent accounts is being used to provide indirect access to an Iranian bank, it must take all appropriate steps to prevent the access, including notification to the account holder and, if necessary, termination of the account.

The Clearing House supports the overall approach taken by FinCEN in imposing this special measure against Iran. Nonetheless, there are several ambiguities in the proposed rule that require clarification, and U.S. banks believe that additional guidance from FinCEN is needed in several areas. Moreover, since FinCEN published this proposal in the Federal Register, legislation has been enacted that may eliminate—or at least reduce—the need for the proposed special measure, and we recommend that FinCEN consider the effect of this legislation on its proposal. Our members understand the importance of the banking sector’s assistance in the Government’s foreign policy goals, but having both a complete blocking measure and a 311 special measure against Iranian financial institutions—in addition to certain other potential requirements of the new legislation—is confusing and in some instances may require contradictory internal directions to staff and systems’ adjustments. It would be beneficial to the industry to have clear direction from Treasury’s bureaus and agencies on these topics before institution of a final rule on the 311 special measures against Iran.

In the event that FinCEN does publish a final rule regarding the 311 special measures against Iran, we have the following comments directed at the proposed rule:

One Notice or Repeated Notices: In its request for comments, FinCEN asked whether a single notice or multiple notices to a foreign bank that a covered financial institution believes may be providing services to an Iranian banking institution should be required. We believe that a single notice coupled with the monitoring requirements of the rule would be sufficient. After a notice, if monitoring indicates that a financial institution is not following the requirements of the notice, banks in the United States are required to

³ *Id.* at 72,881.

⁴ *Id.* at 72,882-83.

take further steps, including closing the offending bank's account. It is, therefore, sufficient to require a single notice with adequate monitoring

Definition of Iranian Bank. The proposed regulations define an "Iranian banking institution" as any foreign bank chartered by Iran, including its branches, offices, or subsidiaries operating in any jurisdiction; any licensed branch or office of a foreign bank in Iran; Iran's central bank; and "[a]ny foreign bank of which more than 50 percent of the voting stock or analogous interest is owned by two or more foreign banks chartered by Iran."⁵

Our member banks report that they have already updated their AML monitoring and OFAC compliance systems to add all of the known Iranian banks and their subsidiaries, and as they become aware of additional banks and subsidiaries these are being added as well. There is, however, some concern about subsidiaries and joint ventures that they do not know about. It is often difficult for U.S. banks to get accurate information about the ownership of foreign financial institutions where they do not have a direct account relationship with the foreign institution; it is even more difficult to discern the true ownership of other subsidiaries or joint ventures. Public sources of information provide some help, but they are not always complete. Governments that are seeking to impose sanctions are often the best source of information on these matters, and FinCEN should consider publishing a list of all institutions that it knows to be encompassed by the definition of Iranian banking institution.⁶ With such a list, U.S. banks could more effectively set their screening applications. If FinCEN considers it impractical to publish such a list, it should state in the Federal Register notice that announces the final rule that covered institutions will not be penalized if a correspondent account has been used to provide services to an Iranian banking institution if there were no reasonably available records showing that institution to have been owned by one of more Iranian banks. FinCEN should also clarify that monitoring for entities not published on lists should be after the fact, not in real time.

Clarification of Indirect Use or Access. A number of FinCEN regulations require covered institutions to undertake due diligence or special due diligence to prevent improper "indirect use" or "indirect access" to its correspondent accounts. The term *indirect access* is not defined, however, and it is not completely clear what the term is intended to cover. It appears that FinCEN is actually seeking to prevent a covered institution's correspondent customer from using the account to provide services to the sanctioned entity—in this case Iranian banking institutions. The typical way for correspondent

⁵ Proposed 31 C.F.R. § 1010.6657(a)(4), 76 Fed. Reg. at 72,884.

⁶ In fact it was most helpful when OFAC recently publish a list of all currently sanctioned Iranian institutions and certain of the entities those institutions own. See "Overview of Iranian-Linked Financial Institutions Designate by the United States," available at http://www.treasury.gov/press-center/press-releases/Documents/012312_Fact_Sheet_-_Designated_Iranian_Financial%20Institutions.pdf.

accountholders to use the accounts to provide services to its own customers is the use the account to complete financial transactions on behalf of the customer, e.g., to send or receive funds transfers on behalf of the customer or process other financial transactions for the customer through the account. If that is what is meant, then covered institutions have a reliable way to exercise special due diligence—place the names of known Iranian banking institutions into a filtering application and screen transactions that pass through the account to ensure that none of them involve an Iranian bank. The covered institution can then take appropriate action if a transaction is identified. We recommend that FinCEN clarify that “indirect use” or “indirect access” be explicitly defined in the final rule to mean the use of the correspondent account by the accountholder to provide banking services to its own customers.

Special Due Diligence. The special due diligence requirement calls for a minimum of two actions: (i) notice to correspondent accountholders who the covered institution believes may provide services to Iranian banks and (ii) monitoring accounts to ensure against improper indirect use.

An issue arises as to what a covered institution is expected to do if its monitoring identifies a transaction involving an Iranian bank. If the Iranian bank is blocked under OFAC rule, the transaction will, of course, be blocked. Even if it is not blocked, OFAC regulations would likely require the bank to reject the transaction and send OFAC a notice of the transaction. The proposed FinCEN rule makes no explicit provision for these circumstances. We believe that FinCEN should be clear about what it wants the bank to do in these circumstances; if FinCEN believes that these transactions should be rejected, it should say so plainly in the final rule. In any event, FinCEN’s final rule should at a minimum reference the OFAC rule and state that the transaction should be either blocked or rejected under the OFAC rule and clarify that its rules do not require a covered institution to take any action that would be inconsistent with OFAC rules.

Recent Legislation. Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”),⁷ which was signed by the President on December 31, 2011, requires the President to prohibit the opening of any correspondent or payable-through account and to prohibit or impose strict conditions on maintaining any correspondent or payable-through account for a foreign financial institution “that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution” subject to sanctions under the International Emergency Economic Powers Act. These prohibitions must be made within 60 days of the date of enactment (i.e., by February 29, 2012). While the provisions of the NDAA are not exactly congruent with the proposed special measure, there is a great deal of overlap. We therefore suggest that FinCEN review

⁷ Pub. L. No. 112-81.

whatever rules that the President issues under NDAA, determine whether the proposed special measure is still necessary, and announce as soon as possible whether it will continue with its proposed special measure.

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We hope these comments are helpful. If you have any questions, please contact me at (212) 612-9234 or joe.alexander@theclearinghouse.org

Very truly yours,

A handwritten signature in black ink, appearing to read "Joseph R. Alexander", with a long horizontal flourish extending to the right.

Joseph R. Alexander
Senior Vice President, Deputy
General Counsel, and Secretary